No. 93-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

EARL BILLISH, *et al.*,
Respondents.

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is neces-

sary because counsel for respondents Chicago Fire Fighters Union Local No. 2, *et al.*, and counsel for respondents Billish, *et al.*, have refused consent.

The *amici* are organizations whose members include state, county, and municipal governments and their officials. This case concerns one of the most pressing and recurring legal issues affecting state and local governments—the need to use race-conscious measures to remedy past racial discrimination in public employment. The *amici* participated on the merits in both *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), two of the Court's most recent cases involving the constitutionality of affirmative action measures taken by local governments. In addition, the Court granted our motion to participate at the probable jurisdiction stage in *City of Richmond v. J.A. Croson Co. See* 484 U.S. 1058 (1988).

In this case, the City of Chicago sought to remedy the effects of a long history of alleged discrimination in its Fire Department. Chicago was subject to a consent decree, obtained by the United States Department of Justice, that required the City to engage in race-conscious promotion practices. In addition, Chicago was faced with extreme statistical disparities between the entry-level and upper ranks of its Fire Department, the likely product of the decades of discrimination in hiring and promotions that led to the consent decree. In these circumstances, Chicago adopted an affirmative action plan, based on written findings, that called for the Fire Department to remedy the past discrimination by appointing a few well-qualified minority firefighters out of the rank order set by an examination.

Many state and local governments have been faced with similar circumstances and have taken action similar to—in some instances, indistinguishable from—those taken by Chicago. Such actions have, as we explain below, been

upheld repeatedly by other courts of appeals. But the court below declared the consent decree irrelevant and minimized the significance of stark statistical disparities that strongly evidenced past discrimination. Instead, the court of appeals based its decision on after-the-fact speculation about the motives of particular local decisionmakers. By doing so, the court of appeals has created a climate of uncertainty in which state and local governments will find it increasingly difficult to function.

The kinds of evidence of past discrimination that were available to Chicago—the consent decree and the statistical disparities that had no other reasonable explanation—are precisely the kinds of evidence of past discrimination that are typically available to state and local governments. It is unusual for more evidence to be available. Indeed, the only alternative to such sources of evidence is a highly divisive inquiry into the decisions of particular officials and employees—something that no community should be forced to undergo as the price of trying to remedy past discrimination.

The limited race-conscious action Chicago took—a relatively few minority promotions out of rank order, as determined by an examination on which strict rank-order distinctions were not material—is close to the minimum needed to deal with the effects of prior discrimination. Moreover, Chicago was obligated to engage in race-conscious promotions by the terms of its consent decree. The failure to engage in some measure of affirmative action would potentially have subjected it to contempt proceedings. The court of appeals nonetheless rejected Chicago's reasonable affirmative action measures, which would have passed muster in several other circuits.

In attempting to deal with the sensitive issues presented by these cases, state and local governments find themselves faced with the threat of litigation from both minority and non-minority employees. This litigation can expose state and local treasuries to substantial compensatory damages

(which can, of course, be awarded whenever a court decides a constitutional issue against a unit of government, even if the constitutional principle was not clearly established when the government acted). Individual officials will be asked to act under the shadow of personally ruinous punitive damages. When, as is often true, the state or local government is also subject to a consent decree, it must make an assessment of its obligations under that decree as well.

In these circumstances, it is especially important to state and local governments that there be clear guidelines that permit them the flexibility they need to address these difficult problems at the level where they are best addressed—by elected governments across the nation. Because of the distinct perspective that state and local governments bring to this issue, and because of our strong interest in it, we respectfully move for leave to submit the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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August 18, 1993

QUESTIONS PRESENTED

1. Whether a state or local government may rely on a consent decree that requires race-conscious action as part of the justification for an affirmative action plan.

2. Whether a state or local government may consider statistical evidence of a manifest underrepresentation of minorities in its workforce in determining whether it has engaged in unconstitutional discrimination that may be remedied by race-conscious affirmative action.

3. Whether a state or local government may depart from strict rank-order use of promotional lists, and make a limited number of race-conscious promotions, when such action is necessary to remedy the effects of prior discrimination and strict rank order does not predict ability to perform the job in question.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. *Background.* This litigation concerns three affirmative action measures taken by the City of Chicago in 1987, but the City initially adopted the affirmative action plan that led to this litigation as a result of lawsuits filed by the United States Department of Justice in 1973 and 1980. Those suits challenged the hiring and promotion practices of the Chicago Fire Department. The promotion aspects of the federal government's suits concerned promotions to the position of engineer, lieutenant, and captain. Pet. App. 19a, 91a. Those are, in ascending order, three of the four non-entry level positions in the Chicago Fire Department. (The position above captain is Battalion Chief. The entry-level position is "firefighter." *Id.* at 18a.) All promotions in the Fire Department are from within the ranks, and all are done on the basis of examinations. *Ibid.*

The 1973 lawsuit culminated in a consent decree settling the hiring aspects of the federal government's suit. Pet. App. 18a-19a, 91a.[1] The 1980 lawsuit was a response to a set of promotional examinations administered by the City in 1979; the federal government alleged that these examinations had a severe adverse impact on minorities and were not adequately validated, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Pet. App. 20a, 91a-92a. The 1980 lawsuit was resolved by a consent decree that specified, among other things, that the City (*id.* at 92a):

> as a long range goal, shall seek to promote black and Hispanic persons in sufficient numbers so as to increase substantially the minority composition in each of the promotional ranks [of the Fire Depart-

[1] This litigation also led to an injunction, entered by the court of appeals, that forbade the City from making any promotions based on the examinations the City had administered "unless the promotions were 'first offered to minority candidates on the respective lists in the order of their rank thereon.'" Pet. App. 20a (citation omitted).

> ment] with the objective that each such rank become more representative of the racial and ethnic composition of the rank or ranks from which promotion to it are made.

2. *The Chicago Fire Fighters case.* In 1983, when Fire Commissioner Louis Galante took office, he determined that the 1979 promotional lists were stale and ordered that new examinations be prepared and administered and new lists be compiled. Pet. App. 23a. Respondents in the *Chicago Fire Fighters* case challenge promotions that were made to engineer and captain from these new lists, but not in strict rank order.

The engineers' examination was administered in 1985, and a promotional list, based on the examination, was prepared in 1986. The captains' examination was administered in 1986 and 1987. The City then addressed the question whether the list was to be used in strict rank order. Pet. App. 23a-24a. In 1987, the City's Commissioner of Personnel determined that the lists should not be used in strict rank order. *Id.* at 24a. In written findings, Commissioner Hoskins identified the following bases for his decision:

> (i) The 1980 consent decree required the Department to take steps to increase the minority composition of the upper ranks of the Department so that they would more closely reflect the ranks from which promotions were made. The City's Corporation Counsel was of the view that the use of strict rank order would violate the decree. 6/16 letter at 1; 7/9 letter at 1.[2]
>
> (ii) The engineers' list could not be validated for use in strict rank order. That is, while a substantial difference in scores likely reflected genuine differ-

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[2] The citations refer to pages in Commissioner Hoskins's letters, which were dated respectively June 16, 1987, and July 9, 1987. The letters are found at Chicago Fire Fighters R. 71, Exhibits E and F.

ences in ability to do the job, small differences in scores did not reflect such genuine differences in ability. Rank-order promotions would therefore violate Title VII. 6/16 letter at 2-3.

(iii) Statistical evidence demonstrated that the effects of prior discrimination persisted in the upper ranks of the Fire Department. These effects would not be remedied by rank-order use of the list. 6/16 letter at 2; 7/9 letter at 2.

(iv) The City's collective bargaining agreement required it to take steps to promote minorities so as to remedy prior discrimination. 6/16 letter at 1; 7/9 letter at 1-2.

Commissioner Hoskins concluded that the lists should be used with promotional goals of 20% black candidates and 5% Hispanic candidates. Fire Commissioner Galante accordingly issued promotional orders in 1987 in which he departed from strict rank order and sought to achieve the affirmative action goals specified by Commissioner Hoskins. Pet. App. 24a.[3]

3. *The Billish case.* The *Billish* litigation involves promotions to captain made by Commissioner Galante in the interval after he had ordered a new captains' examination, but before the Department had completed administering the examination. In December 1986, the Fire Department needed additional captains, and because the captains' examination was not complete, the only available list was the 1979 list. Commissioner Galante promoted 18 white lieutenants and 2 black lieutenants from that list. The minority lieutenants were promoted out of rank order, but only after the Personnel Depart-

[3] Specifically, of the 56 firefighters whom Commissioner Galante promoted to engineer, 8 were black firefighters promoted out of rank order. (The 48 rank-order promotions included 7 black firefighters and 2 Hispanic firefighters.) Commissioner Galante promoted 24 lieutenants to captain, one of whom was a Hispanic lieutenant promoted out of rank order. (The rank order promotions included five black lieutenants.) Pet. App. 24a.

ment had determined that their scores and experience qualified them for the position. Pet. App. 23a-24a.[4]

4. *The decisions below.* Judges Holderman and Zagel of the Northern District of Illinois granted summary judgment in favor of the City and its officials in *Chicago Fire Fighters* and *Billish* respectively. Pet. App. 84a-106a; 107a-127a. A panel of the Seventh Circuit, over a dissent, affirmed in *Chicago Fire Fighters* and affirmed in part and reversed in part in *Billish*. *Id.* at 16a-83a.

The court of appeals then granted rehearing en banc and, by a vote of 5-4 (with Judges Flaum and Rovner not participating), overturned the panel's ruling and reversed the district courts in both cases. The en banc majority concluded that the City had only a limited basis for believing that it had engaged in past discrimination. The majority also suggested that the City's affirmative action measures were not narrowly tailored to remedy that discrimination.

a. *Past discrimination.* In assessing the evidence that the City had discriminated in the past, the en banc majority put the consent decree wholly aside. It asserted that the City's actions were not "required by the consent decree," and that even if they were, "this would not be a defense [because t]he plaintiffs were not parties to the decree." Pet. App. 6a.

The majority then concluded that there was sufficient evidence of past discrimination in hiring only for "a brief period of time after the date in 1972 on which Title VII . . . first became applicable to states and municipalities" and before the 1974 consent decree. Pet. App. 5a-6a. The majority asserted that there was "no evidence" that the City had engaged in unlawful discrimination

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[4] The minority lieutenants' scores in fact fell below the nominal "cut off point" on the (then eight-year old) 1979 list, but the Personnel Department determined that this did not reflect on their qualifications for promotion. Pet. App. 23a-24a.

before 1972. *Id.* at 13a. With this conclusion as a predicate—that the only unlawful hiring discrimination occurred in a period of less than two years—the en banc majority rejected the City's justifications for affirmative action promotions to both captain and engineer.

In connection with the promotions to captain, the majority ruled that the City was not justified in concluding that the extremely small number of minority captains in the mid-1980s—7 minority captains out of 194 in 1987 [5]—was the result of discrimination. Pet. App. 13a. The majority reached this conclusion despite recognizing "that there was actionable discrimination in favor of whites . . . in promotions from 1972 to [the consent decree in] 1980" (*id.* at 6a); that even after the 1980 consent decree, the City did not make promotions from a new list for seven years (*id.* at 13a); and that the earlier hiring discrimination could cause a lack of minorities in the upper ranks. *Id.* at 12a. The majority explained that "the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that . . . discrimination was rectified in 1974." *Ibid.*

In connection with the promotions to engineer, the majority again rejected the statistical disparity between the firefighter and engineer ranks on the ground that this disparity might reflect "*nonactionable* discrimination in years past" (Pet. App. 11a; emphasis in original)—that is, discrimination that occurred before Title VII became applicable to state and local governments in 1972. *Id.* at 12a-13a. The majority again relied in this connection on its conclusion that "there is no evidence" of pre-1972 intentional discrimination. *Id.* at 13a. In addition, the majority conjectured that the disparity between the engineer and firefighter ranks was the result of affirmative action in hiring firefighters that the City undertook pursuant to the consent decree that governed hiring. *Id.* at 11a-12a.

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[5] Chicago Fire Fighters R. 71 at Stensland Aff. para. 19.

Finally, the en banc majority rejected the other basis for affirmative action identified in Commissioner Hoskins's findings—the City's determination that the engineers' examination, although generally valid, was not valid for rank order use. The majority asserted that "[t]he city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination" (Pet. App. 11a). The en banc majority cited no expert evidence in the record (and, so far as we are aware, there is none) suggesting that the test might have been valid for use in rank order.

b. *Narrow tailoring.* The en banc majority also commented on whether some of the affirmative action measures were narrowly tailored. As for the two promotions at issue in the *Billish* case—promotions that Commissioner Galante made in January 1987 out of the rank order set by the discriminatory 1979 test, while he awaited a new list—the majority suggested that Commissioner Galante should have waited until the new list became available. (It ultimately became available in October 1987.) The majority explained (Pet. App. 8a):

> It seems that, distressed by the all-white composition of the group of captains appointed in the latest round of promotions, Commissioner Galante decided to appoint possibly unqualified blacks without waiting to see how blacks would perform on a race-neutral examination. If that is what happened—a question for trial—it would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that [this Court's decisions] require[].

Finally, the en banc majority stated that in promoting one Hispanic lieutenant to captain out of rank order, a promotion at issue in the *Chicago Fire Fighters* case, the Department might have been "trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order." Pet. App. 14a.

Four judges dissented for the reasons stated in the panel opinion. Pet. App. 15a.

ARGUMENT

The en banc court of appeals, by the narrowest of margins, has decided an issue of exceptional importance in a way that is inconsistent with the decisions of several other courts of appeals and contrary to the rulings of this Court. This decision creates a climate of debilitating uncertainty for state and local governments that seek to remedy past discrimination without exposing themselves and their officials to liability. The fact that the decision is technically interlocutory in no way mitigates the harmful effects it will have on state and local governments throughout the nation. Further review is therefore warranted.

1. The issues presented by this case are common among state and local governments. They arise whenever state and local governments are confronted with powerful evidence of extensive past discrimination in hiring and promotions within a government department and seek to remedy the effects of that discrimination.

Especially in police and fire departments, the effects of discrimination can persist in the upper ranks long after the government stops actively discriminating. That is because careers in police and fire departments can span two or three decades, and operational needs often require—as in the Chicago Fire Department—that promotions be made exclusively from within the department. In these circumstances, unless the state or local government takes some form of remedial affirmative action in promotions, it will be at least a generation before the effects of hiring discrimination on the upper ranks are undone.

It is well established that a state or local government has a compelling interest in not perpetuating the effects of past discrimination. *See, e.g., Shaw v. Reno,* 113 S. Ct. 2816, 2831-32 (1993); *City of Richmond v. J.A. Croson*

Co., 488 U.S. 469, 493 (1989) (plurality opinion); *id.* at 518 (Kennedy, J., concurring). This is true even when the past discrimination is by entities other than the government. *See id.* at 491-93 (plurality opinion). When, as here, the government is at risk of perpetuating the effects of its own unlawful discrimination, its interest in taking remedial action is even stronger. *See id.* at 518 (Kennedy, J., concurring): "[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself."

In these circumstances, it is sensible for state and local governments to do what Chicago did here: to adopt, as a flexible benchmark for promotions, the composition of the ranks from which promotions are made, and to seek gradually to achieve that goal—not by the wholesale use of quotas, but by occasionally promoting a few well-qualified minority employees out of strict examination rank order, together with large numbers of minority and nonminority employees promoted according to traditional criteria. There is simply no more limited way to remedy within a reasonable time the effects of discrimination on the upper ranks.

The decision of the court of appeals in this case seriously threatens this reasonable and practical approach to an extremely difficult problem. First, the court of appeals trivialized the significance of the statistical disparity between upper and lower ranks by insisting that there was "actionable" hiring discrimination only in a period of less than two years, between 1972 and 1974. This is an unrealistic and legally unwarranted conclusion, inconsistent with the decision of every other court of appeals that has addressed the issue.

Second, the court of appeals simply refused to consider a powerful piece of evidence that validates the appropriateness of the City's actions: the consent decree, en-

tered into after extensive litigation, that demonstrates both the strong basis for the City's actions and the appropriateness of the specific measures it chose.

Third, the court of appeals subjected the City's decisions to a form of highly intrusive, after-the-fact micromanagement. After breezily and erroneously discarding the consent decree and the statistical disparities as justifications for the affirmative action plan, the court of appeals speculated—and invited a jury to speculate—that specific decisions by City officials were not efforts to implement the plan but instead reflected only that the officials were "distressed by" the lack of minorities in a recently promoted group, that the City was seeking to "curry favor" with minorities, or that the City's findings about the validity of tests—findings uncontradicted by any expert evidence in the record—"sound like pretexts" (Pet. App. 8a, 14a, 11a). State and local governments and their officials should not be asked to make decisions in a climate of the kind that will be created if the court of appeals' approach prevails.

2. The court of appeals' decision cannot be reconciled with the First Circuit's decision in *Stuart v. Roache,* 951 F. 2d 446 (1st Cir. 1991) (Breyer, J.), *cert. denied,* 112 S. Ct. 1948 (1992), which upheld race-conscious promotions on facts strikingly similar to those present here. *Stuart,* like this case, was a challenge to promotions (in the Boston Police Department) made pursuant to a consent decree. 951 F. 2d at 448-49. Judge Breyer identified three factors that established a sufficient basis for Boston to engage in affirmative action in promotions, each of which is present in this case as well.

First, only 0.45 percent of the sergeants in the Boston police department were black, but 4.5 percent of the officers eligible for promotion were black (951 F. 2d at 450)—just as, in Chicago, there was a severe disparity between the upper ranks and the ranks from which promotions were made. (In Chicago in 1987, the percentage

of minority lieutenants was almost four times the percentage of minority captains; the percentage of minority firefighters was almost two and one-half times the percentage of minority engineers. Chicago Fire Fighters R. 71 at Stensland Aff. para. 19.)

Second, earlier litigation had established that Boston discriminated in hiring before 1970.[6] Judge Breyer explained why this was significant in language that echoed Commissioner Hoskins's rationale for Chicago's affirmative action plan and that directly contradicts the Seventh Circuit's refusal to recognize that Chicago had a basis for believing that the underrepresentation of minorities in the upper ranks was the result of discrimination (951 F. 2d at 452):

> The result, as of 1970, was a Police Department with just over 2 percent of its officers black or hispanic, in a city where these minority groups comprised 16 percent of the total population. Obviously, if few blacks become police officers, few blacks will become sergeants. . . .
>
> One obvious reason, then, why there may have been few black sergeants in the Boston Police Force in 1978 is that the Department had not hired many black police officers before 1970. Since unjustified discrimination accounted for the latter fact, the latter fact cannot excuse the former.

The First Circuit went on to state expressly that "findings of recent entry-level discrimination would seem sufficient to justify race-conscious remedies at both entry and pro-

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[6] The earlier litigation in Boston was a litigated case (*Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972)), leading to a judicial finding of discrimination in hiring, whereas in Chicago the finding of hiring discrimination was the product of a consent decree. But the Seventh Circuit did not question that the consent decree gave Chicago an adequate basis for concluding that there had been discrimination in hiring. *See* Pet. App. 5a-6a.

motional levels." *Ibid.* This proposition is irreconcilable with what the en banc court of appeals did in this case.[7]

The third factor that, the First Circuit ruled, established a basis for affirmative action in promotions was that there were "allegations of unfair, discriminatory promotional examinations." 951 F. 2d at 452. As in this case, the examinations were discriminatory in the sense that they had a disparate impact and were not validated. *See id.* at 451. Here, of course, there are not just allegations of discriminatory promotional exams but a court

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[7] Although the en banc Seventh Circuit did not address the reasoning of *Stuart*, it did offer this argument to support its decision to disregard the underrepresentation of minorities in the upper ranks (Pet. App. 11a-12a):

> If, to take an example closer to home, law schools through their affirmative-action programs increased the percentage of minority law students to 10 percent, the fact that law school faculties were on average only 2 percent black would not be evidence of discrimination in appointments to faculty positions. The larger fraction of minority students would be an artifact of the law schools' having lowered their admission standards and not a true measure of the pool from which faculty would be recruited.

The City's affirmative action hiring program was not a matter of "lowering admissions standards." It was a matter of remedying extensive past discrimination (not denied even by the en banc court of appeals) by hiring qualified minorities previously excluded by the City's discriminatory practices. The result was not, as the en banc majority suggests, to bring less qualified firefighters into the workforce. On the contrary: the result was to bring about an entry-level cohort that more closely approximated the workforce that the City would have had in the absence of discrimination.

To make the analogy accurate one would have to hypothesize a law school that had both engaged in extensive discrimination in admissions for a number of years and hired its faculty exclusively from its own graduates. If such a school embarked on a program of affirmative action in admissions designed to produce a student body that reflected the enrollment it would have had in the absence of discrimination, any subsequent sharp disparity between faculty and student body would of course provide a basis for believing that the faculty reflected the effects of past discrimination.

order, and later a consent decree, that forbade the City from using them.

Judge Breyer's opinion in *Stuart v. Roache* also gave five reasons why Boston's affirmative action plan was narrowly tailored; all five apply at least as strongly to Chicago's plan. First, the Boston promotional goals were "linked to the size of the relevant qualified labor pool" (951 F. 2d at 454). As the panel below explained, the Chicago affirmative action goals were similarly related to the qualified pool of employees available for promotions, even if an especially "demanding methodology" was used to make the comparison. Pet. App. 53a-54a. Second, in Boston the minority officers who benefited from the plan were "qualified" officers who "have passed civil service examinations validated as fair and non-discriminatory" (951 F. 2d at 454) even though they were taken out of rank order. The same was true in Chicago; as the panel below noted, "[t]he plaintiffs do not challenge the qualifications of those minority candidates promoted out of rank order" (Pet. App. 53a).[8]

Third, the Boston affirmative action plan "g[a]ve[] only limited advantage to minority officers, increasing the number of black sergeants gradually over time" (951

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[8] The promotions at issue in the *Billish* case were awarded to minority lieutenants whose scores on the 1979 exam were below the "cut off point." This was apparently the basis for the en banc majority's reference to "possibly unqualified blacks" (Pet. App. 8a).

The record, however, contains an explanation that the cut off score is not to be equated with a passing score for purposes of assessing qualifications, since it considers such factors as expected personnel needs. Billish R. 44 at Exh. A paras. 3, 4. Moreover, at the time the promotions were made in 1987, the 1979 examination would have been an unreliable basis for assessing the qualifications of lieutenants who by then had eight more years' experience—even if the examination had not been successfully challenged by the Department of Justice as discriminatory.

The minority lieutenants who were promoted were found by the Personnel Department to be qualified, and the en banc majority cited nothing in the record that impugns that finding.

F. 2d at 454)—just as Chicago appointed only a few employees out of rank order, together with a much larger number of rank-order promotions. Fourth, the Boston affirmative action plan, although it had "been extended twice since its original expiration date . . . and could be extended further," was "limited in time" (*id.* at 454). The Chicago plan was also "limited in duration" (Pet. App. 53a); it was to last "three years or until 350 promotions were made to engineer or 150 promotions to captain." *Ibid.*

Fifth, the Boston affirmative action plan, embodied in a consent decree, "explain[ed] why alternative, racially-neutral relief alone would likely prove inadequate." 951 F. 2d at 455. Commissioner Hoskins's findings also explained why the City was forced to reject race-neutral remedies: Operational needs required that promotions be made from within the Department, thus precluding such alternatives as more aggressive recruiting, but strict rank order use of the list would not remedy the past discrimination. 6/16/87 letter at 3; 7/9/87 letter at 3.

3. The facts of this case are, as we have noted, typical of many affirmative action cases, and—even apart from the outright inconsistency with *Stuart v. Roache*—the crucial steps in the reasoning of the court of appeals are not only incorrect but at odds with the rulings of every other court of appeals that has decided a similar issue. The en banc court of appeals' holding rests on two premises: that despite severe statistical disparities, there was "no evidence" of unlawful pre-1972 discrimination by Chicago in hiring or promotions; and that the consent decree provides no support for Chicago's affirmative action measures.

a. *The statistical disparities.* The en banc court of appeals concluded that because the Justice Department's suits against the City alleged statistical disparities without adequate validation, those suits, and the consent decrees, were evidence only that the City had violated the

"disparate impact" standard of Title VII. Since the Constitution requires a showing of intentional discrimination, not just disparate impact, and since Title VII did not become applicable to state and local governments until 1972, the en banc majority concluded that the only unlawful discrimination in hiring occurred between 1972 and the 1974 consent decree. Pet. App. 11a, 12a-13a. The court of appeals deprecated the suggestion that hiring discrimination in such a brief period could be responsible for the disproportionately small number of minorities in the upper ranks. *Id.* at 12a-13a.

But the en banc court of appeals' flat statement about pre-1972 intentional discrimination—"of this there is no evidence" (Pet. App. 13a)—is inconsistent with common sense, with the decisions of this Court, and with the rulings of at least three other courts of appeals. Statistical disparities, while of course not always conclusive proof of intentional discrimination, are without question *evidence* of intentional discrimination. Therefore they can help establish the "strong basis in evidence for [a] conclusion that remedial action [is] necessary." *Croson,* 488 U.S. at 500, quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277 (1986) (plurality opinion). Indeed, if the statistical disparities are large, " 'they alone' " may justify race-conscious affirmative action. *Croson,* 488 U.S. at 501, quoting *Hazelwood School District v. United States,* 433 U.S. 299, 307-08 (1977).

Of course the City cannot be held liable for violating Title VII in the years before 1972. But it is obviously wrong to say that statistics showing a massive exclusion of minorities from the Fire Department—in 1973, less than 5% of the uniformed personnel in the Chicago Fire Department were black or Hispanic (Pet. App. 18a)—are "no evidence" of unlawful discrimination. This plainly erroneous proposition was a linchpin of the en banc court of appeals' decision. Whether or not those statistics would, without more, have convinced a finder of fact that

the City had violated the Constitution, they are clearly enough to establish that the City had a "strong basis in evidence" to believe that it had intentionally discriminated.

As the Sixth Circuit explicitly ruled: "Evidence of wide statistical disparities . . . may justify an affirmative action policy adopted by a public employer." *Vogel v. City of Cincinnati,* 959 F. 2d 594, 599 (6th Cir.), *cert. denied,* 113 S. Ct. 86 (1992). *See also Jansen v. City of Cincinnati,* 977 F. 2d 238, 242 (6th Cir. 1992), *cert. denied,* 113 S. Ct. 2344 (1993). The Ninth Circuit's position is equally clear: "[W]e emphasize[] that such statistical disparities are 'an invaluable tool' in demonstrating the discrimination necessary to establish a compelling interest." *Associated General Contractors, Inc. v. Coalition for Economic Equity,* 950 F. 2d 1401, 1414 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 1670 (1992), quoting *Coral Constr. Co. v. King County,* 941 F. 2d 910, 918 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 875 (1992). And the First Circuit, in *Stuart v. Roache,* took the same position. 951 F. 2d at 450-52.

In litigation, of course, the parties need not stop with statistics. They can examine the qualifications of particular employees and the actions and dispositions of particular decisionmakers. But state and local governments should not be required to engage in such adversarial, finger-pointing exercises as the price for seeking to remedy discrimination. That is why this Court has repeatedly ruled that a state or local government may engage in affirmative action without a judicial finding of discrimination, so long as it has a "strong basis in evidence" (*Croson,* 488 U.S. at 500) to believe there was discrimination, and that statistical disparities of the kind present here—between the promotional ranks and the specific groups from which all those promoted will be selected—are enough to establish such a strong basis. *See id.* at 501, quoting *Hazelwood,* 433 U.S. at 307-08: "There is no

doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.'" *See also Johnson v. Transportation Agency*, 480 U.S. 616, 651-52 (1987) (O'Connor, J., concurring in the judgment).

b. *The consent decree.* The en banc court of appeals simply put the consent decree aside as a factor in the litigation, reasoning as follows (Pet. App. 6a):

> Even if the [affirmative action] measures had been required by the consent decree, which they were not . . . this would not be a defense. The plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989).

Apart from this passage, the consent decree simply did not play a role in the en banc majority's assessment of whether the City had a substantial basis to engage in affirmative action. It appears that, so far as the en banc majority was concerned, this reasoning exhausted the significance of the consent decree to this litigation.

The en banc majority's approach rests on two misunderstandings. The first is that unless the consent decree "required" the precise actions that the City took, the decree is irrelevant to the constitutionality of the City's actions. But the fact that a consent decree requires race-conscious action is plainly some evidence that the City has a sufficient basis for believing that such action is needed. The consent decree does not become irrelevant just because it contains a long-range goal, instead of specifying each step that must be taken to achieve that goal.

More important, the court of appeals' approach ignores the practicalities faced by state and local governments functioning under consent decrees. Consent decrees are meant to be administered by the parties with a maximum of voluntary compliance and a minimum of litigation.

The City determined that its actions were required by the decree. *See* page 3, *supra*. As long as that determination was reasonable, the City should not be second-guessed on the ground that it should have come closer to the line in assessing its obligations under the decree. Otherwise, the City would be forced to walk a tightrope between violating the consent decree and exposing itself to liability to nonminority plaintiffs.

The en banc majority's second misunderstanding was laid bare by the Eighth Circuit in *Donaghy v. City of Omaha*, 933 F. 2d 1448, 1457-58 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992), another case very similar to this one, in which the Eighth Circuit rejected the very argument that the en banc court of appeals accepted here. The fact that respondents were not parties to the consent decree—and therefore, under *Martin v. Wilks*, were free to contest the constitutionality of the consent decree—is beside the point. The City does not claim that respondents are foreclosed from challenging its actions. It claims only that, on the merits, the consent decree shows that the City established the "strong basis in evidence" needed to justify an affirmative action measure and that the City's actions were "narrowly tailored" to further a remedial purpose (*Croson*, 488 U.S. at 500, 507-08). The Eighth Circuit explained this point in language that applies directly to the reasoning of the court of appeals in this case. *See Donaghy*, 933 F. 2d at 1457.[9]

The court of appeals agreed that the City had a sufficiently strong basis in evidence of past discrimination to

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[9] The Eighth Circuit said (933 F.2d at 1457):

> The flaw . . . is [to] equate[] the right to challenge a consent decree with a general right to be free of race-conscious employment decisions taken pursuant to a consent decree. . . . While *Wilks* permits a nonparty to challenge the validity of employment decisions made pursuant to a consent decree, it does not speak to whether a particular race-conscious employment decision taken pursuant to a consent decree will meet constitutional standards.

justify its decision to enter into the consent decree. Pet. App. 5a-6a. But if the City had a strong enough basis in evidence to conclude that it should enter into a consent decree requiring race-conscious promotions, then it must have had an equally strong basis in evidence to conclude that race-conscious affirmative action was warranted until it had achieved the long-range goal set in the decree.

4. Although the court of appeals' decision is technically interlocutory, it nonetheless fully warrants further review at this point. The effect of the court of appeals' decision is to place state and local governments across the nation in a condition of great uncertainty about the scope of their authority in one of the most sensitive and legally complex areas. That uncertainty will remain no matter what the fate of Chicago's particular affirmative action plan.

Before the Seventh Circuit's decision in this case, the courts of appeals were united—as we have shown—in their approval of the kinds of actions the City took here. But now, parties challenging affirmative action measures will of course rely on the en banc decision of the Seventh Circuit. No matter how influential that decision turns out to be—and, as an en banc decision involving one of the nation's largest cities, it can be expected to be quite influential—the uncertainty it creates will have the effect of chilling efforts by state and local governments to address the problems created by a history of discrimination. Alternatively it will leave state and local officials to speculate about whether the various courses of action they are contemplating will make them liable to nonminority employees objecting to affirmative action or to minority plaintiffs seeking redress for past discrimination. The court of appeals' decision will do this substantial damage, on the basis of erroneous reasoning, even if Chicago's affirmative action measures are ultimately upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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